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Supreme Court, U.S.
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NO. 86,302

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

ADAM G. NUNEZ,

Applicant,

-vs-

WAINOCO OIL & GAS COMPANY, TIDEWATER REALTY, INC., TIDEWATER BARGES, INC., WILSHIRE OIL & GAS COMPANY OF TEXAS, SOUTHERN CROSS LIMITED OF COLORADO, C.D.C. PRODUCING COMPANY, WILLIAMS EXPLORATION COMPANY, SOUTHPORT EXPLORATION INC., THE JOHN W. MECOM COMPANY, T. KEITH MARKS, DONALD F. TODD, CYNTHIA TODD HENDON, RONALD E. MARTIN, GUY V. LAND, REMUDA CORPORATION, LAWRENCE BARKER, JR., H. T. FREEMAN, Trustee, JOE RAMOS, Trustee, WILLIAM W. WILSON, Trustee, A.K. MITTELSTAEDT, Trustee, ROBERT E. MILLER, IRVIN POLLACK, JOHN C. KINARD, DAN W. WILLIAMS, ANDREW R. FISH, HARRY DERNICK, DERNICK RESOURCES, INC., MARINEX PETROLEUM COMPANY, ROGER AND COMPANY, WYNN & ASSOCIATES, EXCHANGE OIL & GAS CORPORATION, LEON COUNTY DEVELOPMENT COMPANY, INC., and CAMERON DEVELOPMENT COMPANY, INC., COMMISSIONER OF CONSERVATION OF THE STATE OF LOUISIANA

Respondants

APPEAL FROM THE SUPREME COURT OF LOUISIANA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

ADAM G. NUNEZ,
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EDITOR'S NOTE

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A. TABLE OF AUTHORITIES

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ARGUMENT

I. Statement about Argument.

Appellees filed a Motion to Dismiss or Affirm. In that motion, Appellees primarily seek to convince this Honorable Court that Appellant should not be granted a Hearing, either in this form of an Appeal or in the form of a Writ. Their thrust has little or nothing to do with the right guaranteed to the landowner by the 5th and 14th Amendments to the U. S. Constitution, nor with the violation of Article 1 Section 4 of the Louisiana Constitution nor of the statutory and jurisprudential Law of the U.S. and of Louisiana. They seek primarily to eliminate any real consideration of the property rights of Appellant. The following is presented in rebuttal of Appellees Motion.

II. Jurisdiction Question

Contrary to the contention of Appellent that the State Supreme Court must have considered the validity of a state statute as against constitutional attack or that the opinion show that the State Court passed upon a federal question inpacting on the facts of the case, 28 U.S.C. 1257 provides very clearly that which is required is that such questions are drawn before the U.S. Supreme Court, and basically that the State Court decision upheld the State Law as contrasted to the U.S. Constitution or laws. If this were not true, then all that a State Court would need to do to prevent a Constitutional question from being heard or a citizen from realizing and receiving the protection, benefits, and guarantees of the Constitution or Federal Law would be for the State Court not to state anything about the Constitution or Federal Law in its opinion. How easy this would be. Then we could have 50 different opinions, all opposite to the Constitutional

guarantees. There would not even have to be a clandestined plan, it could happen without intent.

The parties to the suit cannot force the Court to consider or to include in its discussion any particular question. How often we have seen a decision rendered based on one of several issues raised, and the other issues not even mentioned. Or, factually, how often we have seen decisions based on a question or point not even considered by the parties to the action. To say that this appeal (or writ, if so) should not be considered because the Federal questions were not expressly passed on by the Louisiana Supreme Court would be the ultimate deprivation of the rights provided for and guaranteed by the U. S. Constitution.

Such a thing would be the recognition and approval of the absolute authority of the States and the courts of the various states to dictate and approve and have en-

forced the states laws dehors the Constitution and the supremacy of the Federal Laws. This cannot be. Such a suggestion as a basis to deny this appeal (or Writ) would truly deprive a person of his Constitutional guarantees.

III. Was Federal Question Raised

As to whether or not the federal question was raised, your Honors need only refer to pages 19 through 30 of the Jurisdictional Statement filed by Nunez to realize that the federal question was raised and repeatedly raised in every Court. Possibly Appellees could state that Appellant's Petition and Amended Petition, and later his Briefs were inadequate to force the State Courts to render their decision based on the Federal question, however, just as the writer cannot force this Honorable U.S. Supreme Court to render a decision in favor of Appellant, there was no way that Appellant could force the State Courts to base their decision on any particular thing--be that State or

Federal Law. All Appellant could do was present, and Appellant did present the federal question, as the writer is satisfied this Honorable Court will conclude upon examining pages 19 through 30 of Appellant's Jurisdictional statement.

IV. Substantial Federal Question

As to whether or not there is a substantial federal question warranting review by this Honorable Court, that is a matter for you to decide. It is respectfully submitted, however, that there is a substantial federal question as was presented by Appellant in his Jurisdictional Statement.

V. Question Never Before Presented to This Court

The issue presented by this action has not been considered by this Court before. The closest opportunity this Court had was the case of Texas Oil and Gas Corp. v Rein 534 P 2d 1277 (Okla 1974) in which Oklahoma Courts decided the Commissioner was empowered to create units and to permit wells on

non-consenting landowners. But in the Rein case, the Commissioner permitted a well on the non-consenting landowner. In Nunez v Wainoco the permit was not to drill on Nunez land, but, rather on adjoining land owned by Stone et al. The Louisiana Supreme Court based its decision entirely on the fact that unitization had occurred through the Commissioner and did not even consider the fact that no permit--no authority whatsoever had ever been granted to drill into Nunez land.

It is respectfully submitted that the decision in the Rein case can be justified on the basis of Oklahoma Conservation Statutory Law which provides:

> "(D) For the purpose of this act, the owner or owners of oil and gas rights, in and under a tract of land shall be regarded as a lessee to the extent of 7/8ths interest in and to said rights and a Lessor to the extent of the remaining 1/8th interest therein".

This provision of the statute was later interpreted in Barton v Cleary Petroleum Corporation 566 P2 462 to create a relation-

ship which is "in effect" that of a lessor--lessee between the unit operator and the owner of the unleased land to the extent of one-eighth (1/8) of the owner's undivided interest. The Barton Court held that this relationship would take affect from the moment of the creation of the unit encompassing the unleased unit. As a result, although an owner may not have entered into a lease agreement covering his land, he is faced with a statutorily imposed lessor--lessee relationship with the unit operator to the extent of one-eighth (1/8) of his interest. This is significant when analyzing the issue at hand, because from the moment a unit is created, the unit operator has the statutorily created contractural right of the Lessee, including the right to enter upon and drill on any unleased tract in the unit. When coupled with the fact that Oklahoma recognizes the right of a co-tenant to explore for hydrocarbons

without the consent of his co-tenant, it is realized that the unit operator has the right to drill on any unleased tract in the unit because he has been granted, in effect, a lease on an undivided one-eight (1/8) interest in all such tracts.

Therefore, the power that the Commissioner exercised in the Rein case actually was no "power" at all. The designation by the Commissioner of the best location to drill does not give the operator power to enter and drill on unleased land, because from the moment of unitization, there was "in effect" no unleased land left. The Commissioner, by designating the well on Rein's tract, was merely allowing the operator to do what he already had the statutorily created, contractual authority to do.

This key provision in the Oklahoma statute is absent from its' Louisiana counterpart precluding a similar finding in Louisiana. However, even with the addition of the

Oklahoma provision, a synonymous result would not be possible since Louisiana law does not recognize the right of one co-owner to drill without the consent of his co-owners (see LSA-R.S. 31:164, 31:166, 31:177).

VI. State Law must be complied with, but Federal Law must prevail over State Law.

To an extent the various states (Louisiana included) do regulate their natural resources. However, Federal regulation prevails. One of many, many examples is when the Federal Power Commission, or whatever the federal agency was called, controlled the price of the sale of gas, so that "old gas" sold for 37¢ while production from new wells was selling in Louisiana for something like $8.00. So we do realize, and it is obvious that Federal law does and must control.

The greater importance of this Honorable Court considering this Appeal is the fact that in this case, we have a State agency, the Commissioner of Conservation, exercising "authority" it was never specifically and

expressly granted (see the Opinion in Nunez v. Wainoco, 477 So2 1149) in a manner contra to empowering statute (LSA R.S. 30:9(c)) (See Jurisdictional Statement at page 40 and following) but still, in so exercising that "authority", if the opinion of the Louisiana Supreme Court is to stand, taking property from the landowner--Appellant, contrary to the U. S. Constitution, the Constitution of Louisiana, and all statutory and jurisprudential law existing before Nunez v. Wainoco, and contrary to the statement of the Commissioner of Conservation and the State of Louisiana, that no authority was ever granted to Appellant to drill subsurface into Nunez land.

The various states (Louisiana) can and should regulate the state's natural resources. But that regulation must be in accordance with the Law of the state and not repugnant to the guarantees to the landowners of the 5th and 14th Amendments to the U.S. Constitu-

tion. A state agency can not be permitted to exercise power and authority not expressly and specifically granted to it (see Nunez v Wainoco 477 So2 1149), especially when that sought to be exercised by the State agency cannot be exercised by the State because it is repugnant to the U.S. Constitution, 5th and 14th Amendments. Further, even if the acts of the State Agency, or even of the State were authorized by State Law, if that State Law is repugnant to the U. S. Constitution as is in Nunez v Wainoco , as interpreted by the Louisiana Supreme Court, that action cannot be allowed to stand.

VII. Louisiana Courts Considered Only State Law.

As stated by Appellant and and as clearly recognized by Appellees (repeatedly in their Motion to dismiss or affirm (pg. 15, 16, 17 and in particular on page 12)

> "The decision rendered by the Louisiana Supreme Court simply does not mention, discuss, or pass upon any federal Constitutional questions and the matter was clearly decided solely on the basis of state law."

The Louisiana Courts did not even consider--and if they did consider, they failed to state anything whatsoever relating to the provisions of the 5th and 14th Amendments to the U.S. Constitution and the protection guaranteed to the landowner.

This is the basis of this appeal--or Writ if you will. The realization and maintaining of Appellants property rights as guaranteed by the Constitution and Federal Law must be considered and Appellant's property rights must be protected as against the unauthorized, improper acts of the State Agency.

VIII. There was no due process afforded Nunez in the taking of Nunez Property Rights.

The Commissioner created a unit without permitting a well in its Order in violation of LSA R.S. 31:9(c). The creation of the unit was within the statutorily directed mandate to the Commissioner. But the Commissioner did <u>not</u> permit a well to be drilled on Nunez

land--not in the Order relied on by Appelles, nor at any other time in any manner, even though the law of the State of Louisiana requires that a permit be secured and when secured, the well must be drilled on and into the property on which the well is permitted.

The Louisiana Supreme Court's decision confirms that creating the unit alone authorizes drilling into Nunez land--despite the Law of the State of Louisiana that states the contrary. That decision takes from Nunez the protection of the 5th and 14th Amendments by judicially legislating that unitization alone is sufficient to take property rights from a non-consenting landowner when, in fact the statute does <u>not</u> so provide or authorize in direct disregard of the constitutional protection guaranteed to landowner. This taking--this expanding by the Louisiana Supreme Court of the statute --or if contrary to the belief of the writer, the statute does

authorize the taking of property rights from a non-consenting landowner, the State statute that so authorizes is opposite the guarantees by the U.S. Constitution, 5th and 14th Amendments.

IX. Conclusion.

This is the first time that the questions and issues raised by this action have ever been presented to this Honorable Court. It is a matter of/for first impression. It will serve as a guide for like actions and a determination of landowners property rights in the future. A review should and is respectfully submitted, must be granted, as there is most definitely a serious question of the violation of the protection of the landowners property rights guaranteed by the U.S. Constitution, 5th and 14th Amendments, Louisiana Constitution, Article 1 Section 4, and all Statutory and Case Law existing before Nunez v Wainoco.

It is respectfully submitted that for

the reasons, and based on the Constitutional, statutory and jurisprudential law presented in the Jurisdictional Statement and in this Brief, an Appeal, or in the alternative, Writs should be granted.

Respectfully Submitted:

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STATE OF LOUISIANA : AFFIDAVIT OF FILING
PARISH OF CALCASIEU : AND OF SERVICE

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified within and for the State and Parish aforesaid, personally came and appeared

ADAM G. NUNEZ

who, being by me first duly sworn, deposed and said:

THAT appearer is an attorney at law and is appealing to the United States Supreme Court in proper person in the matter of Adam G. Nunez vs. Wainoco Oil & Gas Company et al;

THAT the Opposition to Motion to Dismiss or Affirm relating to this appeal is being filed with the United States Supreme Court by depositing same in the United States Government mail and/or United States Post Office with first class postage prepaid and properly addressed to the Clerk of the United States Supreme Court within the time allowed for filing, the depositing of said Opposition to Motion to Dismiss or Affirm in the United States Government mail taking place this 25 day of October 1986.

THAT service of this Opposition to Motion to Dismiss or Affirm is made upon Wainoco Oil & Gas Company, Tidewater Realty Inc., Tidewater Barges, Inc., Wilshire Oil & Gas Company of Texas, Southern Cross Limited of Colorado, C.D.C. Producing Company, Williams Exploration Inc., the John W. Mecom Company, Cynthia Todd Hendon, Ronald E. Martin, Guy V. Land, Remuda Corporation, Lawrence Baker, Jr. H. T. Freeman, Trustee, Joe Ramos, Trustee, William W. Wilson, Trustee, A. K. Mittelstaedt, Trustee, Robert E. Miller, Irvin Pollack, John C. Kinard, Dan W. Williams, Andrew R. Fish, Harry Dernick,

Dernick Resources Inc., Marinex Petroleum Company, Roger & Company, and Wynn & Associates through their Counsel of Record upon Liskow & Lewis, attorneys at law, attention: Lawrence Simon, Robert Jordan, Kerry N. Massari and Martha Q. Thomas at post office box 52008, O.C.S., Lafayette, Louisiana 70505, upon Exchange Oil & Gas Corporation, their Counsel of Record, Peter Monrose, Esq., at 24th Floor, 1250 Poydras Street, New Orleans, Louisiana 70112, upon Leon County Development Company Inc., and Cameron Development Company, Inc. through their counsel of record upon John McCollam, Esq., 2450 Pan American Life Center, Suite 2450, New Orleans, Louisiana 70130 and Edmund McCollam, Esq. at Post office box 1548, Houma, Louisiana 70360, and upon the Department of Conservation, State of Louisiana, through its Counsel of Record, Veil David Devillier, at post office box 1149, Eunice, Louisiana 70535, said service being made by depositing copies of said Opposition to Motion to Dismiss or Affirm in the United States Government mails, sufficient postage attached thereto, properly addressed to said counsel who represents all parties to these proceedings, except appearer, who does hereby certify to service being accomplished as aforesaid.

All of the above is accomplished this 29 day of October 1986.

SWORN TO AND SUBSCRIBED before me, this 29 day of October 1986, in Sulphur, Calcasieu Parish, Louisiana.

NOTARY PUBLIC